Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JOHN P. FONTENOT, ET AL.,

Petitioners,

versus

DUAL DRILLING CO., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Honorable United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

This case presents the precise question which this Court articulated, but did not reach, over thirty years ago in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979); namely, whether "Congress . . . intended to adopt the existing maritime rule [taken from the common-law, over a century before, that a longshoreman who is injured by the concurrent negligence of his employer and a third party tortfeasor may recover the entire amount of his damages from the tortfeasor not due to his own negligence] even for third party actions under the Act [the Longshore and Harbor Workers' Compensation Act] that are not within the admiralty jurisdiction?"

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Honorable United States Court of Appeals for the Fifth Circuit whose judgment is sought to be reviewed are:

John P. Fontenot, Petitioner
Ashley Nicole Fontenot, Petitioner
Wanda Renee Fontenot, Petitioner
John Parish Fontenot, Jr., Petitioner
ENSCO Platform Company, Respondent
Highlands Insurance Company, Respondent
Sphere Drake Insurance Company, Respondent
Weatherford Enterra, Inc., Intervenor
National Union Fire Insurance Company, Intervenor

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CITATIONS OF OPINIONS AND ORDERS

The judgment sought to be reviewed, i.e., the judgment of the Honorable United States Court of Appeals for the Fifth Circuit, is found in the Federal Reporter.[1] See *Fontenot v. Dual Drilling Co.*, 179 F.3d 969 (5th Cir. 1999). The order of the United States Court of Appeals for the Fifth Circuit denying Petitioner's Petition for Rehearing En Banc is not reported.[2] The aforementioned judgment reversed the judgment[3] entered by the United States District Court for the Western District of Louisiana, in that certain civil action entitled *"John P. Fontenot, et al v. ENSCO Platform Company, et al"*, Docket Number 97-0178 "L-O", on a jury's verdict[4] returned after a trial on the merits. The District Court's judgment is not reported.

STATEMENT OF THE BASIS FOR JURISDICTION

On July 2, 1999, the United States Court of Appeals for the Fifth Circuit entered the judgment sought to be reviewed in this civil case. Thereafter, on September 3, 1999, the United States Court of Appeals for the Fifth Circuit entered an order, denying Petitioner's timely filed

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[1] See Fifth Circuit's opinion annexed hereto at App. 1-App. 23.

[2] See Fifth Circuit's order annexed hereto at App. 32-App. 33.

[3] See District Court's judgment annexed hereto at App. 24-App. 28.

[4] See jury's verdict annexed hereto at App. 29-App. 31.

Petition for Rehearing En Banc. This Court now has jurisdiction to review the aforementioned judgment under 28 U.S.C. § 1254(1), which effectuates its appellate jurisdiction granted by U.S.C. Const. Art. III, § 2, cls. 1 and 2. In its order denying the Petition for Rehearing En Banc filed by Petitioner, the United States Court of Appeals for the Fifth Circuit specifically stated that it was treating said Petition as a Petition for Rehearing. Consequently, under 28 U.S.C. § 2101(c) and Rule 13(1) and (3) of this Court's Rules, Petitioner has ninety days from the date of the denial of his Petition for Rehearing, or until December 2, 1999, to file this Petition for a Writ of Certiorari, which has been timely filed.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED IN THE CASE

The pertinent constitutional provision involved in this case is: U.S.C. Const. Art. VI, cl. 2.[5]

The pertinent statutes involved in this case are: LSA-C.C. Art. 2323(A); LSA-R.S. 23:1103(A)(1) and (C); LSA-R.S. 23:1104; 33 U.S.C. § 933(a)-(g); and, 43 U.S.C. § 1333(a)(1) and (a)(2)(A).[6]

[5] This constitutional provision is reproduced at App. 34.

[6] These statutes are reproduced at App. 34-App. 42.

STATEMENT OF THE CASE

On January 27, 1997, Petitioner, John P. Fontenot, individually, and as Administrator of the estates of his minor children, Ashley Nicole Fontenot, Wanda Renee Fontenot and John Parish Fontenot, Jr., filed a Complaint for Damages in the United States District Court for the Western District of Louisiana. In his Complaint for Damages, Petitioner alleged that he was severely injured on April 8, 1996, while working on a fixed platform located on the Outer Continental Shelf in the Gulf of Mexico off the Louisiana coast (South Marsh Island Block 155). Respondent, ENSCO Platform Company, (Respondent ENSCO) and its insurers, Respondents, Highlands Insurance Company and Sphere Drake Insurance Company, were among the Defendants named in Petitioner's Complaint for Damages. On February 24, 1997, Petitioner's employer, Weatherford Enterra, Inc., (Weatherford) filed a Petition for Intervention whereby it sought to recover all benefits it paid to Petitioner under the Longshore and Harbor Workers' Compensation Act (L.H.W.C.A.).

As Petitioner's injuries were alleged to have occurred on a fixed platform located on the Outer Continental Shelf, the District Court had subject matter jurisdiction of Petitioner's civil action by reason of the Outer Continental Shelf Lands Act (O.C.S.L.A.) and its federal question jurisdiction. In particular, the jurisdiction of this case or controversy was conferred upon the District Court by U.S.C. Const. Art. III, § 2, cl. 1, as implemented by The Congress in 28 U.S.C. § 1331 and 43 U.S.C. § 1333(a)(1).

On September 15, 1997, the trial on the merits of Petitioner's civil action commenced before a jury in the

District Court. Prior to submitting the case to the jury for deliberation and decision, **the District Court ruled that the jury would not be allowed to consider the issue of employer fault under Louisiana's recently enacted comparative negligence scheme (which now requires quantification of employer fault) because said state law (LSA-C.C. Art. 2323(A)) was inconsistent with the L.H.W.C.A. and thus could not be applied in an action brought under the O.C.S.L.A.**[7] Thereafter, the jury returned a verdict: (a) assigning fault in the ratio of seventy-five (75%) percent to Respondent ENSCO and twenty-five (25%) percent to Petitioner; and, (b) awarding damages in the amount of One Million One Hundred Ninety Thousand and No/100 ($1,190,000.00) Dollars. On October 3, 1997, the District Court entered judgment in accordance with the jury's verdict. On November 26, 1997, after their Motion for New Trial was denied, Respondents filed a Motion for Appeal, taking an appeal to the United States Court of Appeals for the Fifth Circuit.

On September 2, 1998, oral argument was heard in this case by a panel of the United States Court of Appeals for the Fifth Circuit. During oral argument, the panel requested that the parties submit additional authorities on the issue of the applicability of the Louisiana comparative fault law (LSA-C.C. Art. 2323(A)) that requires the

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[7] The District Court also assigned two (2) other independent bases for its decision, to-wit: (1) Respondents' evidence would not support a jury finding that Weatherford was at fault; and, (2) Respondents' request that the issue of employer fault be submitted to the jury was untimely.

quantification of employer fault. On July 2, 1999, the panel rendered its decision whereby it concluded that the Louisiana comparative fault law was applicable in this case and that the District Court erred in refusing to allow the jury to quantify employer fault.[8] The panel then reversed the District Court's judgment and remanded the case for further proceedings consistent with its opinion.

On July 15, 1999, Petitioner timely filed a Petition for Rehearing En Banc in the United States Court of Appeals for the Fifth Circuit. On September 3, 1999, the Court of Appeals disposed of this Petition for Rehearing En Banc by initially treating it as a Petition for Rehearing, which was denied. Then, after citing Fed.R.App.P., Rule 35, and 5th Cir.R. 35, and noting that "[n]o member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc . . . ," the Court of Appeals' order went on to state that " . . . the Petition for Rehearing En Banc is DENIED."

LAW AND ARGUMENT

(A). RULE 10 CONSIDERATIONS

The United States Court of Appeals for the Fifth Circuit has decided an important question of federal law

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[8] The panel also disagreed with the District Court's finding that the evidence was insufficient for the jury to consider the issue of employer fault; and, it further concluded that the District Court abused its discretion in determining that Respondents' request that this issue be submitted to the jury was untimely.

that has not been, but should be, settled by this Court, to-wit: Whether "Congress . . . intended to adopt the existing maritime rule [taken from the common-law, over a century before, that a longshoreman who is injured by the concurrent negligence of his employer and a third party tortfeasor may recover the entire amount of his damages from the tortfeasor not due to his own negligence] even for third party actions under the Act [the Longshore and Harbor Workers' Compensation Act] that are not within the admiralty jurisdiction?" As noted above, this Court articulated, but left unanswered, this question in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979). However, since *Edmonds*, supra, there have been significant developments in state laws applied to third party actions under the L.H.W.C.A. that are not within the admiralty jurisdiction, which make it imperative that this Court answer the aforementioned question. These developments appearing under the euphemistic label of "tort reform", when combined with the procedures and distribution schemes imposed by The Congress under 33 U.S.C. § 933, threaten to destroy the viability of third party actions under the L.H.W.C.A. that are not within the admiralty jurisdiction, i.e., all third party actions other than those brought under 33 U.S.C. § 905(b) or (c) based on the negligence of a vessel.

As shown below, the asserted error of the United States Court of Appeals for the Fifth Circuit does not consist merely of erroneous factual findings or the misapplication of a properly stated rule of law. Rather, the asserted error consists of the Court of Appeals' adoption of an entirely new rule of law, i.e., a proportionate-fault

rule, which places injured longshoremen bringing third party actions under the L.H.W.C.A. that are not within the admiralty jurisdiction in a position far worse than injured longshoremen bringing third party actions under 33 U.S.C. § 905(b) and injured state workers bringing third party actions under the Louisiana Workers' Compensation Act. This is so because *Edmonds*, supra, precludes the application of a proportionate-fault rule to third party actions under 33 U.S.C. § 905(b), while the Louisiana legislature has enacted various quid pro quos (inconsistent with 33 U.S.C. § 933 and thus unavailable to injured longshoremen) that ameliorate the harshness of the proportionate-fault rule in third party actions under state law.

Finally, if this Court chooses not to answer the question presented in the case *sub judice*, it is certain that other Petitions for a Writ of Certiorari raising the identical question will be presented as other states with significant longshore activities enact comparative fault schemes similar to that created by LSA-C.C. Art. 2323(A) and related statutes.[9]

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[9] Louisiana is not the only state with significant longshore activities to adopt a comparative fault scheme that requires the assessment or quantification of employer fault in third party actions. See, e.g., West's Ann.Cal.Civ.Code § 1431.2 as interpreted in *Hernandez v. Badger Construction Equipment Company*, 43 Cal.Rptr.2d 732 (Cal. Ct. App., 4th Dist. 1994), review denied (Jan. 5, 1995), cert. denied, 514 U.S. 1065, 115 S.Ct. 1694, 131 L.Ed.2d 558 (1995); and, FSA § 768.81 as interpreted in *Allied-Signal, Inc. v. Fox*, 623 So.2d 1180 (Fla. 1993).

(B). THE *EDMONDS* RATIONALE AND ITS APPLICABILITY TO THIRD PARTY ACTIONS UNDER THE L.H.W.C.A. THAT ARE NOT WITHIN THE ADMIRALTY JURISDICTION

Edmonds, supra, reversed a judgment rendered by the United States Court of Appeals for the Fourth Circuit sitting en banc wherein said Court of Appeals vacated a District Court's judgment, which refused to reduce a longshoreman's recovery by considering his employer's fault. As initially noted by *Edmonds*, supra, the District Court's judgment was " . . . **in accordance with maritime law, and the common law as well**, . . . ". *Id.* at 443 U.S., 258, 99 S.Ct., 2755. *Edmonds*, supra, then discussed developments in the law, which led The Congress to enact 33 U.S.C. § 905(b) in 1972. Citing this Court's earlier decisions in *Cooper Stevedoring Company, Inc. v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974), and *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 72 S.Ct. 277, 96 L.Ed. 318 (1952), *Edmonds*, supra, stated that, as the law governing third party actions within the admiralty jurisdiction had evolved by 1972, " . . . **a longshoreman's award in a suit against a negligent shipowner would be reduced by that portion of the damages assignable to the longshoreman's own negligence; but, as a matter of maritime tort law, the shipowner would be responsible to the longshoreman in full for the remainder, even if the stevedore's negligence contributed to the injuries.**" *Id.* at 443 U.S., 259-260, 99 S.Ct., 2756. Ironically, this well-established rule of admiralty law was adopted by this Court from the common law rule of joint and several liability (now undergoing radical changes under the guise of "tort

reform") in *The Atlas*, 93 U.S. 302, 3 Otto 302, 23 L.Ed. 863 (1876) and *The Juniata*, 93 U.S. 337, 3 Otto 337, 23 L.Ed. 930 (1876). *Edmonds*, supra, concluded its review of the law leading up to the enactment of 33 U.S.C. § 905(b), holding:

> ***"For a number of reasons, we are unpersuaded that Congress intended to upset a 'long-established and familiar princip[e]' of maritime law by imposing a proportionate-fault rule.*** Cf. [Citation omitted.]" (Emphasis added.) *Id.* at 443 U.S., 263, 99 S.Ct. 2758.

Edmonds, supra, proceeded to point out the error in the reasoning of the United States Court of Appeals for the Fourth Circuit, which found that a perceived conflict between two (2) sentences in 33 U.S.C. § 905(b) could only be reconciled by modification of the well-established maritime (and common law) rule in a manner that would diminish the damages recoverable by the longshoreman from the shipowner on the basis of the proportionate-fault of the stevedore. *Edmonds*, supra, concluded that the conflict perceived by the United States Court of Appeals for the Fourth Circuit was largely one of its own creation. *Edwards*, supra, then engaged in an analysis, which is very pertinent to the question presented by this Petition for a Writ of Certiorari. In particular, *Edmonds*, supra, held:

> ***"The legislative history strongly counsels against the Court of Appeals' interpretation of the statute, which modifies the longshoreman's pre-existing rights against the negligent vessel.*** The reports and debates leading up to the 1972 Amendments contain not a word of this concept. This silence is most eloquent, for such reticence

while contemplating an important and controversial change in existing law is unlikely. Moreover, the general statements appearing in the legislative history concerning § 905(b) are inconsistent with what respondent argues was in the back of the legislators' minds about this specific issue. ***The Committees repeatedly refer to the refusal to limit the shipowner's liability for negligence, which they felt left the vessel in the same position as a land-based third party whose negligence injures an employee. Because an employee generally may recover in full from a third-party concurrent tortfeasor, these statements are hardly indicative of an intent to modify the law in the respect found by the Court of Appeals.*** At the very least, one would expect some hint of a purpose to work such a change, but there was none.

* * *

Finally, we note that ***the proportionate-fault rule adopted by the Court of Appeals itself produces consequences that we doubt Congress intended. It may remove some inequities, but it creates others and appears to shift some burdens to the longshoreman.***

* * *

Under the Court of Appeals' proportionate-fault rule, however, there will be many circumstances where the longshoreman will not be able to recover in any way the full amount of the damages determined in his suit against the vessel. If, for example, his damages are at least twice the benefits paid or payable under the Act and the ship is less than 50% at fault, ***the total***

of his statutory benefits plus the reduced recovery from the ship will not equal his total damages. More generally, *it would appear that if the stevedore's proportionate fault is more than the proportion of compensation to actual damages, the longshoreman will always fall short of recovering the amount that the factfinder has determined is necessary to remedy his total injury, even though the diminution is due not to his fault, but to that of his employer.*

But the impact of the proportionate-fault rule on the longshoreman does not stop there. *Under § 933(b),* an administrative order for benefits operates as an assignment to the stevedore-employer of the longshoreman's rights against the third party unless the longshoreman sues within six months. And a corresponding judicially created lien in the employer's favor operates where the longshoreman himself sues. In the past, this lien has been for the benefits paid up to the amount of the recovery. *And under § 933(c),* which Congress left intact in 1972, where the stevedore-employer sues the vessel as statutory assignee it may retain from any recovery an amount equal in general to the expenses of the suit, the costs of medical services and supplies it provided the employee, all compensation benefits paid, the present value of benefits to be paid, plus one-fifth of whatever might remain. *Under the Court of Appeals' proportionate fault system, the longshoreman would get very little, if any, of the diminished recovery obtained by his employer. Indeed, unless the vessel's proportionate fault exceeded the ratio of compensation benefits to total damages, the longshoreman would receive nothing from the third-party action, and the negligent stevedore*

might recoup all the compensation benefits it had paid.

Some inequity appears inevitable in the present statutory scheme, but we find nothing to indicate and should not presume that Congress intended to place the burden of the inequity on the longshoreman whom the Act seeks to protect. Further, the 1972 Amendments make quite clear that "the employer shall not be liable to the vessel for such damages directly or indirectly," 33 U.S.C. § 905(b) (emphasis supplied), and that with the disappearance of the ship's contribution and indemnity right against the stevedore the latter should no longer have to appear routinely in suits between longshoreman and shipowner. Consequently, as we have done before, ***we must reject a "theory that nowhere appears in the Act, that was never mentioned by Congress during the legislative process, that does not comport with Congress' intent, and that restricts . . . a remedial Act. . . .*** " [Citation omitted.]

* * *

Though we recently acknowledged the sound arguments supporting division of damages between parties before the court on the basis of their comparative fault, see [citation omitted], ***we are mindful that here we deal with an interface of statutory and judge-made law.*** In 1972 Congress aligned the rights and liabilities of stevedores, shipowners, and longshoremen in light of the rules of maritime law that it chose not to change. "One of the most controversial and difficult issues which [Congress was] required to resolve . . . concern[ed] the liability of vessels, as third parties, to pay

> damages to longshoremen who are injured while engaged in stevedoring operations." ***By now changing what we have already established that Congress understood to be the law, and did not itself wish to modify, we might knock out of kilter this delicate balance.*** As our cases advise, we should stay our hand in these circumstances. [Citations omitted.] ***Once Congress has relied upon conditions that the courts have created, we are not as free as we would otherwise be to change them. A change in the conditions would effectively alter the statute by causing it to reach different results than Congress envisioned. Indeed, Congress might have intended to adopt the existing maritime rule even for third-party actions under the Act that are not within the admiralty jurisdiction, though we need not and do not reach that issue today.***" (Emphasis added.) *Id.* at 443 U.S., 266-273, 99 S.Ct., 2759-2763.

Parenthetically, this Court's analysis in *Edmonds*, supra, even though rendered in the context of a third party action under 33 U.S.C. § 905(b), applies with equal, if not greater, force to third party actions under the L.H.W.C.A. that are not within the admiralty jurisdiction. This is so because The Congress in enacting 33 U.S.C. § 933, with its procedures and distribution schemes that are inconsistent with a proportionate-fault rule, did not distinguish between third party actions brought under 33 U.S.C. § 905(b) and those that are not within the admiralty jurisdiction. Of course, the reason The Congress did not make this distinction is found in *Edmonds*, supra, i.e., **"The Committees repeatedly refer to the refusal to limit the shipowner's liability for negligence, which they felt left the vessel in the same position as a land-based third**

party whose negligence injures an employee." *Id.* at 443 U.S., 267, 99 S.Ct., 2760.

At the time The Congress enacted 33 U.S.C. § 905(b) in 1972 and last amended 33 U.S.C. § 933 in 1984, the common law rule of joint and several liability was uniform throughout the states. And, Louisiana was no exception as joint and several liability (solidary liability) was imposed on concurrently negligent tortfeasors prior to the 1987 amendment to LSA-C.C.P. Art. 2324. **The expressed desire of The Congress that vessels be placed in the same position as land-based third parties whose negligence injures an employee was thus realized until the current wave of "tort reform" began to sweep through the states.**

The inequities so elegantly described by this Court in *Edmonds*, supra, that would have occurred with the application of a proportionate-fault rule in third party actions under 33 U.S.C. § 905(b) will now occur with the application of that rule in third party actions that are not within the admiralty jurisdiction. To paraphrase *Edmonds*, supra, under the Court of Appeals' proportionate-fault rule, there will be many circumstances where the longshoreman will not be able to recover in any way the full amount of the damages determined in his suit against the third party tortfeasor. If, for example, his damages are at least twice the benefits paid or payable under the Act and the third party tortfeasor is less than fifty (50%) percent at fault, the total of his statutory benefits plus the reduced recovery from said tortfeasor will not equal his total damages. More generally, if the employer's proportionate fault is more than the proportion of compensation to actual damages, the longshoreman will always fall

short of recovering the amount that the factfinder has determined is necessary to remedy his total injury, even though the diminution is due not to his fault, but to that of his employer.

But, as described in *Edmonds*, supra, the impact of the proportionate-fault rule on the longshoreman does not stop there. Under 33 U.S.C. § 933(b), an administrative order for benefits operates as an assignment to the employer of the longshoreman's rights against the third party unless the longshoreman sues within six months. And, a corresponding judicially created (and inviolable) lien in the employer's favor operates where the longshoreman himself sues. See, e.g., *Bloomer v. Liberty Mutual Insurance Company*, 445 U.S. 74, 100 S.Ct. 925, 63 L.Ed.2d 215 (1980); *Bartholomew v. CNG Producing Company*, 862 F.2d 555 (5th Cir. 1989); and, *Peters v. North River Insurance Company of Morristown, New Jersey*, 764 F.2d 306 (5th Cir. 1985). Under 33 U.S.C. § 933(e) and (f), this lien is for the L.H.W.C.A. benefits paid by the employer up to the amount of the net recovery made by the longshoreman, i.e., the longshoreman's total recovery minus his legal expenses incurred in effecting the recovery. See *Bartholomew*, supra. And, under 33 U.S.C. § 933(e), where the employer sues the third party tortfeasor as statutory assignee, it may retain from any recovery an amount equal in general to the expenses of the suit (including a reasonable attorney's fee), the cost of all benefits actually provided to the employee under 33 U.S.C. § 907, all compensation benefits paid, the present value of all compensation benefits to be paid, and the present value of the cost of all benefits thereafter to be furnished under 33 U.S.C. § 907. Consequently, under the proportionate-fault

system adopted by the United States Court of Appeals for the Fifth Circuit in the case *sub judice*, the longshoreman would get very little, if any, of the diminished recovery obtained by his employer. Indeed, unless the third party tortfeasor's proportionate-fault exceeded the ratio of compensation benefits to total damages, the longshoreman would receive nothing from the third-party action, and the negligent employer might recoup all the compensation benefits it had paid.

This analysis taken directly from *Edmonds*, supra, demonstrates the inequities that will occur with application of the proportionate-fault rule adopted by the United States Court of Appeals for the Fifth Circuit for third party actions under the L.H.W.C.A. that are not within the admiralty jurisdiction. This analysis also demonstrates one of the reasons for the asserted error committed by the Court of Appeals in the case *sub judice*, which is said Court's failure to recognize that 33 U.S.C. § 933 impacts all third party actions under the L.H.W.C.A. As *Edmonds*, supra, finds, this impact can be especially severe in the area of allocating fault to a third-party tortfeasor. Yet, the Court of Appeals fails to recognize this impact, when it concludes:

> "In sum, OCSLA requires that we apply Louisiana law to the extent that it is consistent with applicable federal law (i.e., LHWCA). ***To the extent that LHWCA addresses the problem of allocating fault to a third-party tortfeasor, its provisions are limited by their terms to situations involving the negligence of a third-party vessel. No vessel is involved in this case, thus the LHWCA third-party fault scheme is inapplicable, and we are left with the Louisiana law***

> ***which imposes third-party liability and its rule of comparative fault as the governing law.*** Under Louisiana law, ENSCO was entitled to appropriate jury interrogatories to implement this rule and the district court erred by failing to so charge the jury. *Id.* at 977-978.

The inequities revealed by the *Edmonds*, supra, analysis alone ought to provide the impetus necessary for this Court to act. However, the detrimental impact of the Court of Appeal's judgment upon third party actions under the L.H.W.C.A. that are not within the admiralty jurisdiction does not stop here. As shown below, further inequities are visited upon the injured longshoreman, who is unable to benefit from numerous quid pro quos enacted into law by the Louisiana legislature in a comprehensive scheme governing third party actions under state law that somewhat ameliorate the harshness of the comparative fault rule that requires quantification of employer fault under LSA-C.C. Art. 2323(A).

(C). NO QUID PRO QUO

In its opinion rendered in the case *sub judice*, the panel cites LSA-R.S. 23:1104 for the proposition that, once the factfinder apportions fault under LSA-C.C. Art. 2323(A), such fault shall not be reallocated to any other party. However, the panel's opinion completely overlooks LSA-R.S. 23:1103(A)(1) and (C) and LSA-R.S. 23:1104 (the other reason for the Court of Appeals' asserted error) whereunder numerous quid pro quos were enacted into law by the Louisiana legislature in connection with the passage of LSA-C.C. Art. 2323(A) to form a comprehensive scheme governing third party actions under state

law. For example, LSA-R.S. 23:1103(A)(1) provides that: "**The employer's credit against its future compensation obligation shall be reduced by the amount of attorney fees and court costs paid by the employee in the third party suit.**" LSA-R.S. 23:1103(C)(1) provides that **an employer who intervenes in an employee's third party action shall " . . . be responsible for a share of the reasonable legal fees and costs incurred by the attorney retained by the plaintiff, . . . ".** LSA-R.S. 23:1103(C)(2) provides that: "**When recovery of damages from a third party is made without filing of a suit, the employer shall be responsible for an amount, not to exceed one-third of his recovery on pre-compromise payments, for reasonable legal fees and costs incurred by the attorney retained by the employee or his dependent in pursuit of the third party matter.**" Finally, and most significantly, LSA-R.S. 23:1104 provides that, if any fault on the part of the employer as well as any fault on the part of the employee is assessed or quantified by the factfinder: "**[t]he recovery had in such a suit by the employer or any other person having paid or having become obligated to pay compensation shall be reduced by the fault so assessed.**" See David W. Robertson, *"Love and Fury: Recent Radical Revisions to the Law of Comparative Fault"*, 59 La. L. Rev. 175 (Fall 1998).

These quid pro quos are not available to an injured longshoreman bringing a third party action under the L.H.W.C.A. that is not within the admiralty jurisdiction. **This is so because the procedures and distribution schemes imposed on such third party actions by 33 U.S.C. § 933(e) and (f) do not permit the assessment of attorney's fees and court costs against a L.H.W.C.A.**

employer or any reduction in said employer's recovery based on its own fault and/or the fault of the longshoreman.

To the contrary, in a third party action brought by the L.H.W.C.A. employer, 33 U.S.C. § 933(e)(1)(A) specifically authorizes said employer to retain out of the amount recovered the expenses it incurs in bringing the action, including a reasonable attorney's fee. Similarly, in a third party action brought by an injured longshoreman, 33 U.S.C. § 933(f) requires the longshoreman to bear the entire burden of the expenses incurred in bringing the action, including reasonable attorney's fees. See *Peters*, supra.

The United States Court of Appeals for the Fifth Circuit, in *Peters*, supra, provided a cogent discussion of this Court's decision in *Bloomer*, supra, and its interpretation of 33 U.S.C. § 933(e) and congressional intent in the context of a third party action under the L.H.W.C.A. that was not within the admiralty jurisdiction, holding:

> ***"The courts, at least since the [citation omitted], have uniformly held, however, that the employer has a subrogation right to be reimbursed from the worker's net recovery from a third party for the full amount of compensation benefits already paid.*** See, e.g., [citation omitted]. Moreover, ***the employer may intervene in the worker's suit and assert a lien on the worker's recovery to the extent of the compensation benefits it has paid.*** [Citation omitted.] Although Congress has not explicitly recognized the right to reimbursement in the statute, ***the legislative history of various amendments to the LHWCA makes it clear beyond question that***

> ***Congress is aware that the courts have recognized a compensation lien on third-party recoveries and, indeed, intends for the lien to "remain [ ] inviolable,*** consistent with Bloomer v. Liberty Mutual Insurance Co., 445 U.S. 74 [100 S.Ct. 925, 63 L.Ed.2d 215] (1980)." [Citation omitted.] Bloomer recognizes that the compensation lien attaches to funds obtained by settlement or by judgment. Moreover, the lien recognized in Bloomer does not depend upon proof that the third party breached a duty to the employer or upon an agreement between the employer and the third party to settle a dispute between themselves. Rather, the right to reimbursement attaches to the proceeds of a judgment based upon the third party's breach of duty to the worker or to the proceeds of a compromise agreement between the worker and the third party, at least where the agreement is silent with respect to the employer's right to reimbursement. ***Bloomer also establishes that the employer is entitled to recoup from a third-party recovery the entire amount of the benefits paid without a reduction for its proportionate share of the litigation expenses and attorneys' fees incurred by the worker.*** The compensation lien, however, attaches to the worker's net recovery. See [Citation omitted.] If the worker's recovery is insufficient to cover both the worker's litigation expenses and the compensation lien, therefore, the litigation expenses must be paid first. [Citation omitted.]" (Emphasis added.) *Id.* at 312.

See also *Bartholomew*, supra (" . . . **the effect of the 1984 amendments is to reinforce the holding in Bloomer, rather than to undermine it**"); and, *Ochoa v.*

Employers National Insurance Co., 754 F.2d 1196 (5th Cir. 1985).

Thus, the quid pro quo effected by Louisiana law that requires employers in third party actions brought under said law to bear a portion of the attorney's fees and costs incurred in bringing the action is inconsistent with federal law and cannot be applied in a longshoreman's third party action under the L.H.W.C.A. that is not within the admiralty jurisdiction; and, the injured longshoreman is unable to benefit therefrom.

33 U.S.C. § 933(e) and (f) also do not permit any reduction in the amount of a L.H.W.C.A. employer's recovery based on any fault on its part in causing the longshoreman's injury. Rather, in a third party action brought by a L.H.W.C.A. employer, 33 U.S.C. § 933(e)(1)(B), (C) and (D) specifically authorize said employer to retain out of any amount recovered: (1) the cost of all benefits actually furnished by it to the longshoreman under 33 U.S.C. § 907; (2) all amounts paid as compensation; (3) the present value of all amounts thereafter payable as compensation; and, (4) the present value of the cost of all benefits thereafter to be furnished the longshoreman under 33 U.S.C. § 907. Under 33 U.S.C. § 933(f) and (g)(1), these same items of recovery may be made by a L.H.W.C.A. employer, who intervenes in a third party action brought by an injured longshoreman.

In *Peters*, supra, the United States Court of Appeals for the Fifth Circuit recognized that federal law prohibits any reduction in a L.H.W.C.A. employer's recovery based on its own fault. Again, *Peters*, supra, was concerned with a longshoreman's third party action under the

L.H.W.C.A. that was not within the admiralty jurisdiction. However, citing this Court's decision in *Edmonds*, supra, *Peters*, supra, held:

> "Moreover, it is also clear that, for purposes of determining what defenses are available to a third-party claim, the worker's cause of action cannot be viewed as two distinct claims. The availability of defenses to a worker's third-party suit 'turns most frequently on the underlying issue of the extent to which the subrogee's action is deemed to be derivative from and identified with the employer's cause of action.' [Citation omitted.] ***When the subrogated employer and the worker are viewed as having a single cause of action, the employer's concurrent negligence is no defense to the assertion of that cause of action.*** Id. The Supreme Court has held under the LHWCA that, when the worker brings the suit, the employer's concurrent negligence is not a defense that is available to the third-party tortfeasor. See [citation omitted]; see also [citations omitted]. Moreover, in [citation omitted], ***we held, in circumstances identical to those in this case, that the employer's concurrent negligence will not preclude the employer from asserting its compensation lien on the proceeds of a settlement between the worker and a third party***. The theoretical underpinning of these decisions disappears if the worker's third-party cause of action is, in reality, two distinct claims – one belonging to the worker and the other belonging to the employer." (Emphasis added.) *Id.* at 317-318.

See also *Schreefel v. Okuly*, 192 Cal. Rptr. 402 (Cal. Ct. App., 4th Dist. 1983).

Thus, the quid pro quo effected by Louisiana law that requires a reduction in an employer's recovery based on the factfinder's assessment or quantification of its fault and the employee's fault in third party actions brought under state law is inconsistent with federal law and cannot be applied in a third party action under the L.H.W.C.A. that is not within the admiralty jurisdiction; and, the injured longshoreman is unable to benefit therefrom.

Plainly, the judgment of the United States Court of Appeals for the Fifth Circuit rendered in the case *sub judice* creates a non-maritime third party action under the L.H.W.C.A., which significantly differs from the third party action governed by 33 U.S.C. § 905(b), i.e., a proportionate-fault rule is applied that virtually destroys the non-maritime third party action. The non-maritime third party action under the L.H.W.C.A. created by the Court of Appeals also significantly differs from third party actions brought by injured workers other than longshoremen under state law, even though the same state law partially applies to the non-maritime third party action, i.e., the injured longshoreman is unable to benefit from the quid pro quos enacted into law by the Louisiana legislature in fashioning a comprehensive scheme for the application of a proportionate-fault rule in third party actions under state law.

Simply stated, an injured longshoreman who must bring a third party action under the L.H.W.C.A. that is not within the admiralty jurisdiction now finds himself at a severe disadvantage under the proportionate-fault rule adopted by the Court of Appeals in the case *sub judice,* when compared to injured longshoremen who may bring

a third party action under 33 U.S.C. § 905(b) or injured Louisiana workers who may bring a third party action under the comprehensive scheme effected by the Louisiana Workers' Compensation Act.[10] **Certainly, The Congress never intended to allow such a state of affairs so detrimental to injured longshoremen to come into existence under the L.H.W.C.A., a remedial statute enacted for their protection.**

(D). O.C.S.L.A. – SAME RESULT

In the case *sub judice,* the United States Court of Appeals for the Fifth Circuit analyzed the issue presented within the framework of the O.C.S.L.A. as Petitioner's injuries were sustained on a fixed platform located on the Outer Continental Shelf. However, this analysis does not yield a different result. This is so because 43 U.S.C. § 1333(a)(2)(A) specifically provides that the law of the adjacent state (Louisiana law in this case) is declared to be the law of the United States applicable to such fixed platforms to the extent that said state law is " . . . **not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted,** . . . ". See *Gulf Offshore Company v. Mobil Oil Corporation,* 453 U.S. 473, 101 S.Ct. 2870, 69

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[10] LSA-R.S. 23:1035.2 provides: "***No compensation shall be payable in respect to the disability or death of any employee covered by the Federal Employer's Liability Act, the Longshoremen's and Harbor Worker's Compensation Act, or any of its extensions, or the Jones Act.***" (Emphasis added.) Thus, an injured Louisiana longshoreman cannot even elect to bring a third party action under the Louisiana Workers' Compensation Act.

L.Ed.2d 784 (1981); *Chevron Oil Company v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), overruled on other grounds by *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993); and, *Rodrigue v. Aetna Casualty and Surety Company*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969).

Contrary to the decision of the United States Court of Appeals for the Fifth Circuit, the proportionate-fault rule of LSA-C.C. Art. 2323(A) is plainly inconsistent with other federal law, i.e., 33 U.S.C. § 933. As shown above, LSA-C.C. Art. 2323(A) and related statutes that permit the assessment of attorney's fees and court costs against an employer in third party actions under state law are inconsistent with the procedures and distribution schemes established by 33 U.S.C. § 933(e) and (f), which do not permit the assessment of attorney's fees and court costs against a L.H.W.C.A. employer. Further, LSA-C.C. Art. 2323(A) and related statutes that permit a reduction in the recovery made by an employer in a third party action under state law based on its own fault and the fault of the employee are inconsistent with 33 U.S.C. § 933(e) and (f), which do not permit any such reduction in a L.H.W.C.A. employer's recovery.

Addressing the problem at hand, U.S.C. Const. Art. VI, cl. 2, provides:

> **"Clause 2. Supreme Law of Land**
>
> ***This Constitution, and the Laws of the United States which shall be made in Pursuance thereof***; and all Treaties made, or which shall be made, under the Authority of the United States, ***shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby,***

> ***any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.***" (Emphasis added.)

Interpreting U.S.C. Const. Art. VI, cl. 2, this Court, in *Ferri v. Ackerman*, 444 U.S. 193, 100 S.Ct. 402, 62 L.Ed.2d 355 (1979), held:

> "***The narrow issue presented to this Court is whether federal law in any way pre-empts the freedom of a State to decide the question of immunity in this situation in accord with its own law. We are not concerned with the elements of a state cause of action*** for malpractice and need not speculate about whether a state court would consider petitioner's allegations sufficient to establish a breach of duty or a right to recover damages. Nor are we concerned with the question whether Pennsylvania may conclude as a matter of state law that respondent is absolutely immune. For when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, ***unless, of course, the state rule is in conflict with federal law.*** [Citation omitted.]" (Emphasis added.) *Id.* at 444 U.S., 197-198, 100 S.Ct., 406.

In the case *sub judice*, the state rule, i.e., LSA-C.C. Art. 2323(A), is clearly in conflict with federal law, i.e., 33 U.S.C. § 933. Thus, whether Petitioner was injured by a non-vessel tortfeasor on a fixed platform located on the Outer Continental Shelf or on the docks of New Orleans is of no moment. An O.C.S.L.A. analysis produces the same result as a preemption analysis, i.e., supreme federal law (33 U.S.C. § 933) preempts the inconsistent state law (LSA-C.C. Art. 2323(A)). Consequently, LSA-C.C. Art.

2323(A) cannot and should not be applied to third party actions under the L.H.W.C.A. that are not within the admiralty jurisdiction.

CONCLUSION

Again, this case squarely presents this Court with the issue it left undecided in *Edmonds*, supra, to-wit: Whether "Congress . . . intended to adopt the existing maritime rule [taken from the common-law, over a century before, that a longshoreman who is injured by the concurrent negligence of his employer and a third party tortfeasor may recover the entire amount of his damages from the tortfeasor not due to his own negligence] even for third party actions under the Act [the Longshore and Harbor Workers' Compensation Act] that are not within the admiralty jurisdiction?" As shown herein, the answer to this question must be in the affirmative. Otherwise, third party actions under the L.H.W.C.A. that are not within the admiralty jurisdiction will no longer be viable because of the lethal combination of the procedures and distribution schemes imposed by 33 U.S.C. § 933 and the inconsistent proportionate-fault rule of LSA-C.C. Art. 2323(A) that requires quantification of employer fault.

WHEREFORE, PETITIONER RESPECTFULLY PRAYS that this Court summarily GRANT this Petition for a Writ of Certiorari and REVERSE the judgment of the United States Court of Appeals for the Fifth Circuit insofar as said judgment holds that LSA-C.C. Art. 2323(A) is

applicable to third party actions under the L.H.W.C.A. that are not within the admiralty jurisdiction.

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Revised July 19, 1999

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 97-31294

JOHN P. FONTENOT, individually and as natural tutor, on behalf of Ashley Nicole Fontenot, Wanda Renee Fontenot, and John Parish Fontenot, Jr.,

Plaintiff-Appellee,

VERSUS

DUAL DRILLING CO., ET AL.,

Defendants,

ENSCO PLATFORM COMPANY,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Louisiana

(Filed Jul. 2, 1999)

Before DeMOSS, PARKER and DENNIS, Circuit Judges.

PARKER, Circuit Judge:

Defendant-Appellant ENSCO Platform Company ("ENSCO") appeals the judgment for Plaintiff, John P. Fontenot ("Fontenot") in this personal injury action. We reverse and remand.

I. FACTS

Plaintiff Fontenot began employment with Weatherford-Enterra, Inc. ("Weatherford") in 1994. Fontenot is borderline mentally handicapped with an IQ of approximately 70. Fontenot's wife died in October 1995, after which he was assigned to work onshore to allow him to tend to his three minor children and personal affairs. Five months later, Weatherford assigned Fontenot to a crew conducting casing operations on a stationary platform on the Outer Continental Shelf offshore Louisiana. Fontenot was part of a "pick-up crew," referring to the fact that most of the crew members had not worked with each other on prior jobs and, more specifically, Fontenot was not a regular member of the crew.

Weatherford's crew was hired to run casing from the offshore platform into the hole of a well. Each joint of casing had to be filled with drilling "mud." Fontenot was assigned the job of mud valve operator. He was to instruct the driller, an ENSCO employee, when each joint of casing was full of drilling mud so that the driller could turn off the flow of mud into the joint.

Initially, the mudline and pump that were being used did not require the active participation of Fontenot. Then Weatherford's supervisor, Leo Meche ("Meche"), requested that ENSCO change the pump and line to speed up the process of filling casing with mud. The line and pump were changed, and the new line included a valve on the end of the mudline with a handle that could open and close the valve. Meche instructed Fontenot and other persons on the rig not to close the mudline valve at any time while the mud pump was running because it

was dangerous to do so in light of the extreme pressure that could build up quickly in the line. Despite these instructions, Fontenot closed the mudline valve. Pressure built up, then was suddenly released, hurling Fontenot up into the derrick, badly injuring one of his fingers.

II. DISTRICT COURT PROCEEDINGS

On January 27, 1997, Fontenot, individually and on behalf of his three minor children, brought suit against ENSCO, alleging that he was injured due to the negligence of ENSCO. ENSCO answered, denying liability and affirmatively alleging comparative fault by Fontenot and "other parties." Subsequently, Weatherford and Weatherford's workers' compensation insurer filed a Complaint of Intervention seeking to enforce their rights of subrogation to recover amounts paid to or on behalf of Fontenot.

The case proceeded to a jury trial on September 15, 1997. The jury returned its verdict, finding Fontenot 25% at fault, ENSCO 75% at fault, and awarded total damages of $1,190,000 against ENSCO. The court entered judgment consistent with that verdict on October 3, 1997. ENSCO filed a motion for new trial, which was denied. ENSCO appealed.

III. ANALYSIS

A. QUANTIFYING FAULT

1. District court ruling and standards of review

ENSCO contended at trial that, pursuant to Louisiana tort law, the Jury Verdict Form should direct the jury to

quantify Plaintiff's employer's fault. *See* LA. CIV. CODE ANN. art. 2323(A) (West 1997). The district court denied the request.

First, the trial court held that the Louisiana rule of comparative fault which requires quantification of employer fault is "inconsistent" with other federal law, specifically the Longshore and Harbor Workers Compensation Act, 33 U.S.C. §§ 901-950 ("LHWCA"), thereby precluding application of comparative fault to this case, pursuant to the Outer Continental Shelf Lands Act ("OCSLA"). The district court articulated two alternative bases for its denial of ENSCO's request to have the jury quantify employer fault: one, the evidence would not support a jury finding that Weatherford had any responsibility for Fontenot's accident and, two, ENSCO's request was not timely filed. We consider each ruling in turn.

ENSCO's challenge to the district court's holding that state and federal law are inconsistent raises a question of law, which we review *de novo*. *See Reeves v. AcroMed Corp.*, 103 F.3d 442, 445 (5th Cir. 1997). Likewise, we review *de novo* the district court's ruling that the evidence was insufficient to go to the jury on this issue. *See* FED. R. CIV. P. 50. We review the district court's decision that the request was untimely for abuse of discretion. *See Emmons v. Southern Pacific Transp. Co.*, 701 F.2d 1112 (5th Cir. 1983).

2. Is Louisiana law inconsistent with LHWCA?

ENSCO points out that LHWCA is silent on the question of quantification of employer fault and that no other federal law is inconsistent with Louisiana tort law. Fontenot, on the other hand, agrees with the district court, taking the position that LHWCA sets out a "loss allocation scheme" based on the rule of joint and several liability which is inconsistent with quantification of employer fault.

The OCSLA provides that when an employee is injured while on the Outer Continental Shelf exploring for natural resources, compensation shall be payable under the provisions of the LHWCA. *See* 43 U.S.C. § 1333(b). The OCSLA also provides:

> To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations . . . the civil and criminal laws of each adjacent State . . . are hereby declared to be the law of the United States for that portion of the . . . Outer Continental Shelf, and artificial islands and fixed structures erected thereon[.]

43 U.S.C. § 1333(a)(2)(A).

Under LHWCA, which is similar to other worker compensation schemes, an employer's liability to an employee who is injured on the job is essentially limited to payment of compensation. *See* 33 U.S.C. § 905(a). The LHWCA also allows the employee to recover for injuries resulting from the fault of third parties. *See* 33 U.S.C. § 933(a). The employee need not choose whether to

receive compensation or to recover damages against a third person; he can do both. *See id.* Election of receiving compensation can operate as an assignment to the employer of the employee's cause of action against third parties. *See* 33 U.S.C. § 933(b). However, the employee has the exclusive right to bring the cause of action against the third party for six months after the incident. *See id.*

Where an injured employee recovers from a third party, the fund recovered is charged first for the cost of the recovery, including attorney fees, next for reimbursement of the compensation paid by the employer and finally, any additional recovery is paid to the injured employee. *See* 33 U.S.C. § 933(f). If the amount due as LHWCA compensation is more than the amount recovered against the third party, the employer remains liable to pay the difference. *See id.* The employer must give consent for any settlement between an employee and a third party which is less than the total amount of compensation owed in order for the employee to continue receiving compensation. *See* 33 U.S.C. § 933(g).

Typically, when the employee files suit against a third party, the employer will intervene to recover the amount of compensation paid, just as Weatherford did in this case. However, as ENSCO emphasizes, the LHWCA is silent on the issue of quantification of employer fault.

Louisiana Civil Code, art. 2323, as amended in April 1996 as a part of a package of tort reform by the Louisiana legislature, provides, in pertinent part:

> In any action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of all persons causing or

> contributing to the injury, death, or loss shall be determined, regardless of whether the person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, immunity by statute, including but not limited to the provisions of R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable.

LA. CIV. CODE ANN. art. 2323(A).

Art. 2323(A) requires the fact finder to apportion fault among all negligent parties regardless of whether the plaintiff can recover from a particular party or not. Once the fact finder makes the apportionment, such fault shall not be reallocated to any other party. *See* LA. REV. STAT. ANN. 23:1104 (West Supp. 1998) Therefore, fault must be attributed to a negligent employer even though the employer is immune from suit under the Louisiana Workers' Compensation Statute, LA. REV. STAT. ANN. 32:1023. *See id. In Keith v. U. S. Fidelity & Guar. Co.*, 694 So. 2d 180 (La. 1997), the Louisiana Supreme Court held that the amendments of art. 2323(A) requiring the quantification of fault of all tortfeasors were procedural and therefore should be retroactively applied to torts occurring prior to the effective date of the amendments, April 16, 1996. Consequently, the fact that Fontenot's injury occurred on April 8, 1996, does not preclude the application of art. 2323(A) to this case.[1] Thus, ENSCO argues that Weatherford's percentage of negligence should have

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[1] However, we note that the Louisiana Supreme Court has held that the 1996 amendment to art. 2324(B) is substantive and therefore applies prospectively only. *See Aucoin v. DOTD*, 712 So.2d 62, 67 (La. 1998).

been determined by the jury and allocated accordingly, reducing the proportion of ENSCO's liability.

The LHWCA contains no express language addressing the subjects of allocation of fault or proportionate liability. Fontenot, while recognizing the absence of any express conflict, nevertheless concludes that LHWCA's scheme allocating the costs of accident injuries is inconsistent with Louisiana's scheme of comparative fault, relying upon *Peters v. North River Ins. Co.* of Morristown, N.J., 764 F.2d 306, 309-10 (5th Cir. 1985). In our view, *Peters* is factually and legally distinguishable and is therefore not controlling.

First, the Louisiana statute at issue in this case (§ 2323(A)), which requires the determination of the percentage of fault of all tortfeasors, had not been passed by the Louisiana Legislature when *Peters* was decided. Second, there was no contention from any party in *Peters* that the employer was at fault in any way for the injuries which Peters received. The sole issue in *Peters* was whether the injured worker and a third-party tortfeasor could deprive the employer of his statutory lien on the settlement proceeds by not notifying the employer of the settlement or by providing in the settlement agreement that the third-party tortfeasor would otherwise satisfy the employer's claim. Finally, Fontenot did not settle with the third-party tortfeasor, as Peters did with the third party in his case; instead, there was a trial on the merits of Fontenot's claim against ENSCO in which the employer and its compensation underwriter intervened to assert their lien upon any judgment proceeds to the extent of sums paid to Fontenot as compensation benefits.

Next, we must consider whether § 905, the substantive LHWCA third-party practice provision, applies to this case. We conclude that it does not; it applies only when the third party is a *vessel*, and there is no vessel involved in this case. That provision reads, in pertinent part, as follows:

> Negligence of vessel
>
> > In the event of injury to a person covered under [LHWCA] *caused by the negligence of a vessel*, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action *against such vessel* as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. * * *

33 U.S.C. § 905(b) (emphasis added).

The portion of § 905 which is most relevant is § 905(c), which reads:

> Outer Continental Shelf
>
> > In the event that the negligence of a vessel causes injury to a person entitled to receive benefits under this chapter by virtue of section 1333 of Title 43, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action *against such vessel* in accordance with the provisions of subsection (b) of this section. Nothing contained in subsection (b) of this section shall preclude the enforcement according to its terms of any reciprocal indemnity provision whereby the employer of a person entitled to receive benefits

> under this chapter by virtue of section 1333 of Title 43 and the vessel agree to defend and indemnify the other for cost of defense and loss or liability for damages arising out of or resulting from death or bodily injury to their employees.

(Emphasis added.) In this case, Fontenot is "a person entitled to receive benefits under this chapter [LHWCA] by virtue of section 1333 of Title 43 [OCSLA]." It is explicit, therefore, that the only third party cause of action contemplated by subsection (c) is the one for "negligence of a vessel" which is to be brought in accordance with subsection (b).

The term "vessel" is defined in § 902(21) as follows:

> (21) Unless the context requires otherwise, the term "vessel" means *any vessel upon which* or in connection with which *any person* entitled to benefits under this chapter *suffers injury or death arising out of or in the course of his employment*, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

(Emphasis added.) There is no person or entity which meets this definition in this case, and there is clearly no vessel of any kind involved, much less one upon which any injury occurred. To the contrary, Fontenot was injured during the course of drilling activities on an oil and gas well located on a fixed platform on the outer continental shelf. The Supreme Court has expressly held that such activities are not maritime in nature. *See Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 421-25 (1985). Therefore, neither § 905(b) nor § 905(c) has any applicability to Fontenot's accident.

This distinction as to whether the third party against whom liability is sought is a vessel or is a non-maritime entity is not mere semantics. Our Circuit has consistently used this distinction to reach different results in the context of third party actions brought by LHWCA employees. For example, the doctrine of contributory negligence under state law as a bar to recovery has been applied to actions against non-maritime defendants under OCSLA, whereas the maritime rule of comparative negligence has been applied to vessel defendants. *See Bertrand v. Shell Oil Co.*, 489 F.2d 293 (5th Cir. 1973); *In re Dearborn Marine Serv., Inc.*, 499 F.2d 263 (5th Cir. 1974). As provided in § 905(c), non-maritime third parties are not prohibited from obtaining contractual indemnifications from LHWCA employers, whereas vessel owners are prohibited from doing so by § 905(b). *Tran v. Manitowoc Eng'g Co.*, 767 F.2d 223 (5th Cir. 1985); *Pippen v. Shell Oil Co.*, 661 F.2d 378 (5th Cir. 1981). Likewise, while the 1972 amendments to LHWCA did away with the strict liability doctrine of unseaworthiness as to vessel owners, this amendment did not prevent application of the Louisiana articles on strict liability to non-maritime defendants under Louisiana law. *See Olsen v. Shell Oil Co.*, 595 F.2d 1099 (5th Cir. 1979).

The other LHWCA provision relevant to third-party claims is § 933. Those parts of § 933 which pertain to an employee's legal action against a responsible third party provide:

Compensation for injuries where third persons are liable

(a) Election of remedies

If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

* * *

(f) Institution of proceedings by person entitled to compensation

If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

* * *

(i) Right to compensation as exclusive remedy

The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided,* That

> this provision shall not affect the liability of a person other than an officer or employee of the employer.

33 U.S.C. § 933.[2]

These two statutory provisions, §§ 905 and 933, accomplish two separate things. Section 905 vests employees covered by LHWCA with a federal third-party cause of action against a vessel based on negligence. "The first sentence [of § 905(b)] addresses the recurring situation . . . where the party injured by the negligence of the vessel is a longshoreman employed by a stevedoring concern." *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 263 (1979). That common tripartite situation addressed in *Edmonds* is not present in this case. There is no vessel in this case; there is no vessel owner in this case; there is no stevedore in this case; and the injured worker was not engaged in any activities related to loading or unloading a vessel at the time of his injury.

Section 933 establishes procedures by which third-party claims are to be prosecuted in the context of a predicate LHWCA claim. Any such third-party claim, unless it is a § 905(b) or (c) claim against a vessel, must be based on some external authority. *See Garvin v. Alumax of S.C., Inc.*, 787 F.2d 910, 917 (4th Cir. 1986). In this case,

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[2] Other provisions of § 933 address, inter alia, circumstances in which the employer may pursue an action against the responsible third party (as the assignee of the injured employee's rights against the third party), *see* 33 U.S.C. § 933(b), (d) & (e), or in which the employee may enter into a settlement with the responsible third party, *see* 33 U.S.C. § 933(g). These statutory provisions are not implicated by the facts of this case.

because the third party tortfeasor was not a vessel, the external authority is the statutory law of the State of Louisiana, which imposes tort liability on a third party tortfeasor proven to be concurrently negligent. In fact, the Louisiana statute, § 2323, was itself applied to Fontenot's claim against ENSCO in that it is the source of the allocation of fault between Fontenot and ENSCO and the elimination of the common law rule of contributory negligence as a bar to a plaintiff's recovery.

Obviously, it is not inconsistent with OCSLA or LHWCA for Louisiana to impose third-party liability; § 933 expressly contemplates such an external law. If the scope of the third-party liability, as well as defenses to it, are established by state law, state law governs the question of whether a proportionate-liability rule applies. *Cf. Ferri v. Ackerman*, 444 U.S. 193, 198 (1979) ("[W]hen state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state law is in conflict with federal law." (citing U.S. Const. Art. VI, cl. 2)). More importantly, however, the proportionate-liability scheme imposed by Louisiana law cannot be *inconsistent* with federal law because there would be no third-party cause of action in this case had Louisiana not provided one. *Edmonds* is not to the contrary because that case dealt with the federal third-party cause of action created by § 905(b) involving a vessel.

In *Rodrigue v. Aetna Casualty & Surety Company*, 395 U.S. 352 (1969), the Supreme Court discussed in detail the legislative history underlying the enactment of OCSLA. *Rodrigue* involved two deaths occurring on fixed offshore platforms on the Outer Continental Shelf. The question

was whether Louisiana tort law or the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.* ("DOHSA"), with its limitations on recoverable damages, would apply. A panel of our Circuit had held that DOHSA applied. The Supreme Court reversed and held that DOHSA did not apply to the platform-related deaths because Congress, in OCSLA, deliberately rejected the application of admiralty and maritime principles to fixed platforms. Therefore, Louisiana tort law applies on fixed platforms located on the Outer Continental Shelf. *See Rodrigue*, 395 U.S. at 366, 89 S. Ct. at 1842.

In reviewing the legislative history of OCSLA, the *Rodrigue* Court noted that there was some initial support in Congress for the application of maritime law to fixed platforms located on the Outer Continental Shelf. Ultimately, however, Congress rejected the notion that maritime principles should apply on fixed platforms located on the Outer Continental Shelf:

> [T]he admiralty action under [DOHSA] no more applies to these accidents actually occurring on the islands than it would to accidents occurring in an upland federal enclave or on a natural island to which admiralty jurisdiction had not been specifically extended.

395 U.S. at 366, 89 S. Ct. at 1842.

Two years after *Rodrigue*, the Supreme Court again considered the application of Louisiana law in connection with an accident arising on a fixed platform on the Outer Continental Shelf. In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the issue was whether Louisiana's one year prescriptive period would apply rather than the admiralty doctrine of laches. A panel of our Circuit held that,

despite the holding in *Rodrigue* rejecting maritime law, the laches doctrine was applicable as a matter of "federal common law." The Supreme Court rejected this notion, stating:

> As we pointed out in *Rodrigue*, Congress recognized that *The Federal Code was never designed to be a complete body of law in and of itself and thus that a comprehensive body of state law was needed.* Congress also recognized that the special relationship between the men working on these artificial islands and the adjacent shore to which they commute favored application of state law with which these men and their attorneys would be familiar. *If Congress' goal was to provide a comprehensive and familiar body of law, it would defeat that goal to apply only certain aspects of a state personal injury remedy in federal court.* A state time limitation upon a remedy is coordinated with the substance of a remedy and is no less applicable under [OCSLA].

404 U.S. at 102-3, 92 S. Ct. at 353-54 (citations omitted, emphasis supplied). The Supreme Court rejected our Circuit's attempt to apply laches as a matter of "federal common law" because the approach "subverts the congressional intent documented in *Rodrigue* . . . that admiralty doctrines should *not* apply under the Lands Act." 404 U.S. at 104, 92 S. Ct. at 354 (emphasis supplied). In concluding its discussion regarding why Louisiana's prescription statute would apply over the purported "federal common law" doctrine of laches, the Court stated:

> Congress specifically rejected national uniformity and specifically provided for the application of state remedies which demand state, not federal, statutes of limitation. Thus, Congress

> made clear provision for filling in the "gaps" in federal law; it did not intend that federal courts fill in those "gaps" themselves by creating new federal common law.

Huson, 404 U.S. at 104-105, 92 S. Ct. at 354.

Following the lead of the Supreme Court in *Rodrigue* and *Huson*, our Circuit has consistently rejected attempts of litigants to have "federal common law" override rules of Louisiana tort law in actions arising on fixed platforms on the Outer Continental Shelf. *See, e.g., Marcel v. Placid Oil Co.*, 11 F.3d 563, 570-71 (5th Cir. 1994) (adopting Louisiana's rule on use of "pre-tax" wages in computing damages for wages and lost earning capacity); *Olsen v. Shell Oil Co.*, 708 F.2d 976, 983 (5th Cir. 1983) (adopting the Louisiana rule on inflation).

This Court has expressly noted that "the substantive right to recover against third parties is, of course, generally determined by law independent of the LHWCA." *Peters*, 764 F.2d at 310. That the LHWCA itself does not provide the rule of decision in actions against third parties is further highlighted by this Court's decision in *Olsen v. Shell Oil Co.*, 708 F.2d 976 (5th Cir. 1983). In discussing the LHWCA employer's independent action against a third party tortfeasor, this Court recognized that the foundation of the claim was based on the underlying law governing the claim (maritime law or state law) and was not based on the provisions of the LHWCA itself. *See id.* at 981. Thus, we noted, in *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 416-17, 420 n. 23 (1969), the Court indicated that the stevedore's right of indemnity, if available, would be under federal maritime law. In the context of the OCSLA, we recognized that the

insurer's remedy was under surrogate state law." *Olsen*, 708 F.2d at 981 n. 3 (citations omitted).

In sum, OCSLA requires that we apply Louisiana law to the extent that it is consistent with applicable federal law (*i.e.*, LHWCA). To the extent that LHWCA addresses the problem of allocating fault to a third-party tortfeasor, its provisions are limited by their terms to situations involving the negligence of a third-party vessel. No vessel is involved in this case, thus the LHWCA third-party fault scheme is inapplicable, and we are left with the Louisiana law which imposes third-party liability and its rule of comparative fault as the governing law. Under Louisiana law, ENSCO was entitled to appropriate jury interrogatories to implement this rule and the district court erred by failing to so charge the jury.

3. Sufficiency of the Evidence on Employer Fault

ENSCO next contends that, contrary to the district court's ruling, there was sufficient evidence in the record to support a jury finding that Fontenot's employer, Weatherford, was at least partially responsible for the accident. We agree.

In order to hold an employee negligent, the reasonableness of his conduct must be assessed *vis a vis* the conduct of his employer, using the following criteria: (1) relative knowledge of the danger by the supervising employee and the injured employee; (2) relative control over the employee's situation; (3) the degree to which the employee's conduct is voluntary; (4) alternatives available to the employee; (5) obviousness of the danger; and

(6) relative ability to eliminate the danger. *See Bridgewater v. State Through Dept. of Corrections*, 434 So.2d 383 (La. 1983). There was evidence that Weatherford knew of Fontenot's mental limitations and personal distractions, as well as the strengths and weaknesses of the other members of the pick up crew. Further, it was Weatherford's supervisor, Meche, who made the decision to change from the slower, but safer mudline and pump to the line and pump that exploded, causing Fontenot's injuries. Further a jury could have found that Weatherford, through Meche, required Fontenot to remain in his position despite his repeated closing of the valve. Based on the record before this court, the district court erred in determining that the evidence was insufficient for the jury to consider whether Weatherford bore some responsibility for the accident.

4. Timeliness of ENSCO's Request

In addition to the foregoing reasons for not allowing the jury to quantify Fontenot's employer's fault, the district court stated: "The request was filed late, past the deadline." On examining the pleadings, we note that ENSCO asserted the defense of third-party fault in its answer and again in the Joint Pre-Trial Stipulations, although it is not entirely clear that the third party referred to in these early pleadings was Weatherford. On Friday, September 12, 1997, prior to the beginning of trial on Monday, September 15, 1997, ENSCO objected to the Jury Interrogatories submitted by Plaintiff and submitted its own Jury Interrogatories, specifically requesting that Weatherford's fault be quantified. The district court's

scheduling order set a deadline of September 5, 1997 for submission of jury instructions and interrogatories. We are called on to decide whether the district court abused its discretion in refusing ENSCO's jury interrogatories, filed prior to trial, but one week beyond the deadline set by the scheduling order, on the basis that they were untimely filed. We conclude that such a decision would have been an abuse of discretion in the circumstances of this case. Further, it is not at all clear from the district court's language that, in the absence of the other factors which the court considered in reaching its decision, the late filing alone would have been sufficient to convince the district court to deny ENSCO's requested jury instructions.

5. Error in jury interrogatories requires reversal and remand

Because we have determined that the three bases articulated by the district court for refusing ENSCO's request for jury interrogatories quantifying employer fault do not support that decision, we conclude that the denial was error. We therefore must reverse and remand this case for further proceedings. However, one other issues [sic] raised on appeal may recur on remand. We therefore address it as well.

B. UNIT OF TIME ARGUMENT

ENSCO contends that the district court's failure to give the jury a cautionary instruction regarding Fontenot's "unit of time" argument was error. "Jury verdicts

on damages may be overturned only upon a clear showing of excessiveness or upon a showing that they were influenced by passion or prejudice." *Westbrook v. General Tire and Rubber Co.*, 754 F.2d 1233, 1241 (5th Cir. 1985). However, if we are persuaded that the jury charge "was substantially flawed and resulted in prejudicial error," we will reverse. *Colburn v. Bunge Towing, Inc.*, 883 F.2d 372, 376 (5th Cir. 1989).

Over ENSCO's objection, Fontenot made the following "unit of time" argument in closing:

> [H]ow about $2 an hour? $2 an hour for the physical pain and suffering, the mental anguish, the scarring and disfigurement, the permanent loss of the use of his hand, $2 an hour for the rest of his life. $16 for half a day, $32 a day. The figures I came up with were $125,000 for physical pain and suffering. For mental anguish, $75,000. . . . And for the disability, the fact that he has to walk around for the rest of his life with his hand in the way that it is, $280,000.

In *Colburn*, 883 F.2d at 377-78, this court reversed a jury verdict based on the district court's failure to give a cautionary instruction to counter the prejudicial effects of the "unit of time" argument made by plaintiff's counsel, reasoning:

> Without a specific cautionary instruction, there is a danger that this argument will create an illusion in the jury's mind that pain and suffering damages can and perhaps should properly be measured or calculated by simple multiplication rather than through the jury's sound discretion.

Id. at 377 (citing *Baron Tube Co. v. Transport Ins. Co.*, 365 F.2d 858, 865 (5th Cir. 1966) (en banc)). The *Colburn* court noted that the "blanket cautionary instruction given in this case that 'any statements, objections, or arguments made by lawyers are not evidence in this case' inadequately addresses" the Court's concern with the use of "unit of time" argument. *Id.*

Given this court's rulings in *Baron Tube* and *Colburn*, the district court's failure to give the instruction was error. Fontenot does not dispute that this circuit's jurisprudence requires a specific cautionary jury instruction when plaintiff makes a "unit of time" argument. However, he argues that ENSCO invited the error. Fontenot included the necessary instruction in the Joint Jury Charges that were submitted by the parties pursuant to the district court's pretrial order. ENSCO objected both in writing and orally to the "unit of time analysis that was in the joint jury interrogatory." The court sustained the objection, saying, "I am not going to give that section. . . . "

The next day, just prior to closing argument, Fontenot's attorney asked the court to clarify whether its ruling precluded him from making the "unit of time" argument. The court responded that Fontenot could argue whatever he wanted to argue, but that the cautionary instruction on "unit of time" would not be included in the jury charge. ENSCO interjected that it was reversible error to allow the argument without the cautionary instruction. The court persisted in its position, denied the cautionary instruction and allowed the argument. Although ENSCO's objection and the court's ruling indicate that there was some confusion on this issue, we

conclude ENSCO did not invite the error. ENSCO's position at trial was clearly that it wished to preclude the "unit of time" argument, but that if the argument was allowed, the cautionary instruction was necessary.

In short, the district court erred in denying ENSCO's request for a cautionary jury instruction on this issue. However, because our ruling on the quantification-of-employer-fault issue mandates reversal, we need not reach the question of whether the failure to give the instruction may have been harmless error.

IV. CONCLUSION

For the foregoing reasons, we reverse the judgment for Fontenot and remand this action to the district court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

JOHN P. FONTENOT, individually and as natural tutor of his minor children, ASHLEY NICOLE FONTENOT, WANDA RENEE FONTENOT and JOHN PARISH FONTENOT, JR.

VERSUS

HIGHLANDS INSURANCE COMPANY, DUAL DRILLING COMPANY, DUAL HOLDING COMPANY and DUAL DRILLING COMPANY (Now known as ENSCO)

CIVIL ACTION
Number: 97-0178
JUDGE HAIK
MAG. JUDGE METHVIN

JUDGMENT

(Filed Oct. 02, 1997)

The above captioned matter came up for trial on September 15, 16, 17 and 18, 1997, and was tried to a jury on those dates. Present and representing the Plaintiff was Lawrence N. Curtis, Esq., T.A., and Lamont P. Domingue, Esq., with Curtis & Lambert, representing ENSCO Platform Company was Alan K. Breaud, Esq., of Breaud & Lemoine, and representing the Intervenors, Weatherford Enterra, Inc. and National Union Fire Insurance company of Pittsburgh, PA, was Dan C. Panagiotis, Esq. After the

selection of the jury, opening statement, taking of evidence, closing argument and instruction of the jury, a verdict was returned in the proper form, as follows:

SPECIAL INTERROGATORIES

1.

Do you find from a preponderance of the evidence the Defendant was negligent in the manner claimed by John Fontenot, and that such negligence was a legal cause of the injuries suffered by him?

Answer "Yes" or Answer "No": Yes

N.B. IF YOU ANSWERED ANSWER "NO" TO QUESTION ONE, YOU NEED NOT CONSIDER OR ANSWER THE REMAINING QUESTIONS.

2.

Do you find from a preponderance of the evidence that John Fontenot was himself negligent in the manner claimed by ENSCO and that such negligence was a legal cause of his own damages under the standards given to you?

Answer "Yes" or "No": Yes

3.

What proportion or percentage of John Fontenot's damages do you find from a preponderance of the evidence to have been legally caused by the fault of the following persons or entities?

Answer in Terms of Percentages:

ENSCO Platform Company 75 %

John P. Fontenot 25 %

N.B. THE TOTAL OF THE PERCENTAGES MUST EQUAL 100%)

4.

Without regard to any percentages that you may have given in your answer to Question Number 3, state the entire amount of damages sustained by John Fontenot as a result of the accident.

Answer in dollars:

Hospital, medical and pharmaceutical expenses, past, present and future	$ 43,000.00
Past loss of earnings	$ 35,000.00
Future loss of earnings	$ 800,000.00
Physical pain and suffering, past, present and future	$ 125,000.00
Mental pain and suffering, past, present and future	$ 130,000.00
Past, present and future disability	$ 57,000.00

Lafayette, Louisiana, on this 18th day of September 1997.

s/ Larry Quebedeaux
Foreperson

Pursuant to jury verdict, judgment is hereby rendered as follows:

IT IS ORDERED, ADJUDGED AND DECREED that there be Judgment herein in favor of Plaintiff, John P. Fontenot, and against Defendant, ENSCO Platform Company, in the full and true sum of EIGHT HUNDRED NINETY TWO THOUSAND, FIVE HUNDRED AND NO/100 ($892,500.00) DOLLARS, said sum to be paid with legal interest from date of judicial demand until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Intervenors, Weatherford Enterra, Inc. and National Union Fire Insurance Company of Pittsburgh, PA, be reimbursed, by preference and priority, out of said Judgment rendered in favor of Plaintiff, John P. Fontenot, and against Defendant, ENSCO Platform Company, the sum of TWENTY-THREE THOUSAND EIGHT HUNDRED SEVENTY-ONE AND 57/100 (23,871.57) DOLLARS paid to or on behalf of Plaintiff, John P. Fontenot, in weekly indemnity benefits and THIRTY-THREE THOUSAND, THREE HUNDRED SIXTY-NINE AND NO/100 (33,369.00) DOLLARS paid to or on behalf of Plaintiff, John P. Fontenot, for medical benefits under the Longshore and Harbor Workers' Compensation Act, with legal interest, from date of judicial demand, until paid, plus any amounts paid to or on behalf of Plaintiff, John P. Fontenot, in weekly indemnity benefits or medical benefits, until this Judgment against Defendant, ENSCO Platform Company, is fully satisfied.

IT IS HEREBY FURTHER ORDERED, ADJUDGE [sic] AND DECREED that Defendant, ENSCO Platform Company, is to bear all costs of these proceedings.

SIGNED in Chambers, at Lafayette, Louisiana, on this 2nd day of ~~September~~ October, 1997.

/s/ Richard T. Haik
HON. RICHARD T. HAIK,
JUDGE
UNITED STATES
DISTRICT COURT

JUDGMENT ENTERED October 3, 1997

BY Donna Norfleet

COPY TO Curtis
Domingue
Breaud
Panagiotis

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

JOHN P. FONTENOT, individually, and as natural tutor of his minor children, ASHLEY NICOLE FONTENOT, WANDA RENE FONTENOT and JOHN PARISH FONTENOT, JR.	CIVIL ACTION NO. 97-0178
	JUDGE HAIK
VERSUS	
DUAL DRILLING COMPANY, DUAL HOLDING COMPANY and DUAL DRILLING COMPANY (now known as ENSCO)	MAGISTRATE JUDGE METHVIN

****

JURY VERDICT FORM

1.

Do you find from a preponderance of the evidence that the Defendant was negligent in the manner claimed by John Fontenot, and that such negligence was a legal cause of the injuries suffered by him?

Answer "Yes" or "No": yes

N.B. IF YOU ANSWERED "NO" TO QUESTION ONE, YOU NEED NOT CONSIDER OR ANSWER THE REMAINING QUESTIONS,

2.

Do you find from a preponderance of the evidence that John Fontenot was himself negligent in the manner

claimed by ENSCO and that such negligence was a legal cause of his own damages under the standards given to you?

Answer "Yes" or "No": yes

3.

What proportion or percentage of John Fontenot's damages do you find from a preponderance of the evidence to have been legally caused by the fault of the following persons or entities?

Answer in Terms of Percentages:

ENSCO Platform Company 75 %

John P. Fontenot 25 %

N.B. THE TOTAL OF THE PERCENTAGES MUST EQUAL 100%

4.

Without regard to any percentages that you may have given in your answer to Question Number 3, state the entire amount of damages sustained by John Fontenot as a result of the accident.

Answer in dollars:

Hospital, medical and pharmaceutical expenses, past, present and future	$ 43,000.00
Past loss of earnings	$ 35,000.00
Future loss of earnings	$800,000.00
Physical pain and suffering, past, present and future	$125,000.00

Mental pain and suffering, past, present and future	$130,000.00
Past, present and future disability	$ 57,000.00

Lafayette, Louisiana on this 18th day of September, 1997.

/s/ Larry Quebedeaux
FOREPERSON

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-31294

JOHN P FONTENOT, individually and as natural tutor, on behalf of Ashley Nicole Fontenot, on behalf of Wanda Renee Fontenot, on behalf of John Parish Fontenot, Jr

Plaintiff - Appellee

v.

DUAL DRILLING CO; ET AL

Defendants

ENSCO PLATFORM CO

Defendant - Appellant

Appeal from the United States District Court
for the Western District of Louisiana, Shreveport

ON PETITION FOR REHEARING EN BANC

(Opinion 7/2/99, 5 Cir., ___, ___ F.3d ___)

(Filed Sept. 3, 1999)

Before DeMOSS, PARKER and DENNIS, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested

that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Robert M. Parker
United States Circuit Judge

* Chief Judge King and Judge Duhé did not participate in the consideration of the petition for rehearing en banc.

REHG-6a

(1). U.S.C. Const. Art. VI, cl. 2:

"**Clause 2. Supreme Law of Land**

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.*" (Emphasis added.)

(2). LSA-C.C. Art. 2323(A) and (B):

"**Art. 2323. Comparative fault**

A. *In any action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined, regardless of whether the person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, immunity by statute, including but not limited to the provisions of R.S. 23:1032*, or that the other person's identity is not known or reasonably ascertainable. If a person suffers injury, death, or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death, or loss.

B. *The provisions of Paragraph A shall apply to any claim for recovery of damages for injury, death, or loss asserted under any law or legal doctrine or theory of*

liability, regardless of the basis of liability." (Emphasis added.)

(3). LSA-R.S. 23:1103(A)(1) and (C):

"§ 1103. Damages; apportionment of between employer and employee in suits against third persons; compromise of claims; credit

A. (1) In the event that the employer or the employee or his dependent becomes party plaintiff in a suit against a third person, as provided in R.S. 23:1102, and damages are recovered, such damages shall be so apportioned in the judgment that the claim of the employer for the compensation actually paid shall take precedence over that of the injured employee or his dependent; and if the damages are not sufficient or are sufficient only to reimburse the employer for the compensation which he has actually paid, such damages shall be assessed solely in his favor; but if the damages are more than sufficient to so reimburse the employer, the excess shall be assessed in favor of the injured employee or his dependent, and upon payment thereof to the employee or his dependent, the liability of the employer for compensation shall cease for such part of the compensation due, computed at six percent per annum, and shall be satisfied by such payment. ***The employer's credit against its future compensation obligation shall be reduced by the amount of attorney fees and court costs paid by the employee in the third party suit.***

* * *

C. (1) ***If either the employer or employee intervenes in the third party suit filed by the other, the***

intervenor shall only be responsible for a share of the reasonable legal fees and costs incurred by the attorney retained by the plaintiff, which portion shall not exceed one-third of the intervenor's recovery for prejudgment payments or prejudgment damages. The amount of the portion of attorney fees shall be determined by the district court based on the proportionate services of the attorneys which benefited or augmented the recovery from the third party. The employee as intervenor shall not be responsible for the employer's attorney fees attributable to postjudgment damages nor will the employer as intervenor be responsible for the attorney fees attributable to the credit given to the employer under Subsection A of this Section. ***Costs shall include taxable court costs as well as the fees of experts retained by the plaintiff. The pro rata share of the intervenor's costs shall be based on intervenor's recovery of prejudgment payments or prejudgment damages.***

(2) ***When recovery of damages from a third party is made without filing of a suit, the employer shall be responsible for an amount, not to exceed one-third of his recovery on pre-compromise payments, for reasonable legal fees and costs incurred by the attorney retained by the employee or his dependent in pursuit of the third party matter.*** The responsibility for payment of this amount shall exist only if there is written approval of the compromise by the employer, his compensation carrier, or the compensation payor." (Emphasis added.)

(4). LSA-R.S. 23:1104:

"§ 1104. Quantification of employer fault

In a suit brought pursuant to R.S. 23:1101, the fault of persons immune from suit in tort under R.S. 23:1032 shall be assessed as a percentage of the aggregate fault of all persons causing or contributing to the employee's injury, and the fault so assessed shall not be reallocated to any other person or party. ***The recovery had in such a suit by the employer or any other person having paid or having become obligated to pay compensation shall be reduced by the fault so assessed. This reduction is in addition to but not duplicative of any reduction made pursuant to Civil Code Articles 2323, 2324, and 2324.2 and R.S. 23:1101(B).***" (Emphasis added.)

(5). 33 U.S.C. § 933(a)-(g):

"§ 933. **Compensation for injuries where third persons are liable**

(a) Election of remedies

If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

(b) Acceptance of compensation operating as assignment

Acceptance of compensation under an award in a compensation order filed by the deputy commissioner, an

administrative law judge, or the Board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such acceptance. If the employer fails to commence an action against such third person within ninety days after the cause of action is assigned under this section, the right to bring such action shall revert to the person entitled to compensation. For the purpose of this subsection, the term "award" with respect to a compensation order means a formal order issued by the deputy commissioner, an administrative law judge, or Board.

(c) Payment into section 944 fund operating as assignment

The payment of such compensation into the fund established in section 944 of this title shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person.

(d) Institution of proceedings or compromise by assignee

Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Recoveries by assignee

Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, *shall be distributed as follows*:

(1) *The employer shall retain an amount equal to –*

(A) *the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee* as determined by the deputy commissioner or Board);

(B) *the cost of all benefits actually furnished by him to the employee* under section 907 of this title;

(C) *all amounts paid as compensation;*

(D) *the present value of all amounts thereafter payable as compensation,* such present value to be computed in accordance with a schedule prepared by the Secretary, *and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title,* to be estimated by the deputy commissioner, *and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative;* and

(2) *The employer shall pay any excess to the person entitled to compensation or to the representative.*

(f) Institution of proceedings by person entitled to compensation

If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) of

this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

(g) Compromise obtained by person entitled to compensation

(1) *If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier,* before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

(2) *If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits*

under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

(3) ***Any payments by the special fund established under section 944 of this title shall be a lien upon the proceeds of any settlement obtained from or judgment rendered against a third person referred to under subsection (a) of this section.*** Notwithstanding any other provision of law, such lien shall be enforceable against such proceeds, regardless of whether the Secretary on behalf of the special fund has agreed to or has received actual notice of the settlement or judgment.

(4) ***Any payments by a trust fund described in section 917 of this title shall be a lien upon the proceeds of any settlement obtained from or judgment recorded against a third person referred to under subsection (a) of this section.*** Such lien shall have priority over a lien under paragraph (3) of this subsection." (Emphasis added.)

(6). 43 U.S.C. § 1333(a)(1) and (2)(A):

"**§ 1333. Laws and regulations governing lands**

(a) **Constitution and United States laws; laws of adjacent States; publication of projected State lines; international boundary disputes; restriction on State taxation and jurisdiction**

(1) ***The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and***

other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, *to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State*: Provided, however, That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2)(A) *To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf,* and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf." (Emphasis added.)